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IN THE

Supreme Court of the United States

October Term, 1963.

No. 987.
No. 1026.

PRADO OIL AND GAS COMPANY,
Petitioner in No. 987,

SKELLY OIL COMPANY, et al.,
Petitioners in No. 1026,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY,
Respondents.

RESPONSE TO PETITIONS FOR A WRIT OF CERTIORARI.

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Respondents, The United Gas Improvement Company and Long Island Lighting Company, each gas distribution companies (herein referred to as "Distributor Respondents"), make the following Response to the Petition for a Writ of Certiorari filed by Prado Oil and Gas Company in No. 987 and to the Petition for a Writ of Certiorari filed by Skelly Oil Company, *et al.* in No. 1026.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether the Federal Power Commission has the duty, when it ultimately issues permanent certificates of public convenience and necessity under Section 7 of the Natural Gas Act, to order refund of amounts collected by producers, under conditional temporary certificates issued to them *ex parte*, above the price level found to be required by the public convenience and necessity.

COUNTER-STATEMENT OF THE CASE.

For their Counter-Statement of the Case, Distributor Respondents rely upon and call this Court's attention to the statement in the opinion of the Court of Appeals below (Skelly Pet. 11a-13a).

ARGUMENT.

The decision of the Court of Appeals for the District of Columbia Circuit below dealt with two major issues. The first issue, that of the proper initial price for the interstate sales of gas by producer-applicants, was before the Court of Appeals in Docket Number 17859, *inter alia*, on appeal by Prado Oil and Gas Company from the Federal Power Commission's finding that a 15¢ per Mcf price was required by the public convenience and necessity for sales from Texas Railroad Commission District No. 4 during the period involved. The second issue was raised by the appeals of the Public Service Commission of the State of New York in Number 17582 and Distributor Respondents in Number 17628 from the Commission's refusal to order refund of windfall excesses collected by producers under *ex parte* temporary authority above the lawful 15¢ initial price.

Distributor Respondents were not intervenors in Number 17859 before the Court of Appeals below. However, being named Respondents by Petitioner Prado Oil and Gas Company in its Petition for a Writ of Certiorari, Distributor Respondents make the following brief response. The Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit in Number 17859 on the initial price issue should be denied. The clear reasons for denying said Writ are set forth in the Responses filed with this Court by the Federal Power Commission, Respondent below in Number 17859, and the Public Service Commission of the State of New York, an intervenor below in that case, and need not be duplicated here.

On the refund issue, the position of Distributor Respondents that the Natural Gas Act does not permit the device of temporary authorization to become the source of windfall rate collections by producers, was vindicated by the decision of the Court of Appeals below which held that

the Federal Power Commission has the power to prevent such windfalls.

The Federal Power Commission, in its decision reviewed below, had not denied its power to condition the issuance of permanent certificates on the giving up of windfall excesses collected under temporary authority. Rather, assuming the power, it nonetheless entered a "directed verdict" for the producers, allowing them to retain excess amounts collected above rates found to be required by the public convenience and necessity from the initiation of service in interstate commerce. The Court of Appeals reversed this "directed verdict" and remanded to the Commission for further proceedings. Such proceedings, within the scope of the Court's mandate, could involve either a "directed verdict" in favor of consumer interests, or a "new trial," if further factual evidence appeared to be required as a basis for Commission decision.

Respondents were satisfied with this vindication of their position by the Court of Appeals and confident that the action of the Commission on remand could only be a "directed verdict" ordering complete refund of windfall excesses collected by producers. Such a result is dictated by facts that appear from the petitions of producers themselves to this Court, which show:

(1) The producer-petitioners sought the temporary authorizations here at issue solely to avoid alleged individual economic hardship, not because of any consumer or general public need (Skelly Pet. 4, 21-22).

(2) In addition to the temporary certificates here in litigation, the Commission has issued many thousands of temporary certificates (Skelly Pet. 22). Under the theory advocated by Petitioners the existence of the certificates would mean circumvention of Section 7 of the Natural Gas Act for protracted periods and enormous windfalls to pro-

ducers at the expense of consumers. See *Atlantic Rfg. Co. v. Public Service Comm'n*, 360 U. S. 678 (1959) (*CATCO*).

(3) The absence of careful administrative scrutiny given to initial price or any other issue by the Commission in issuing temporary certificates is dramatized in the present case by its issuance to Skelly Oil Company of a temporary certificate which Skelly never even requested (Skelly Pet. 4, n. 3). Such summary administrative haste could be valid only if subsequent Commission action offers a complete bond of protection for consumers through refunds. *Atlantic Rfg. Co. v. Public Service Comm'n, supra.*

(4) Temporary certificates in the present proceedings were sought and obtained as early as November 12, 1959; while hearings on the applications for permanent certificates did not begin until March 10, 1960 (Skelly Pet. 4-5), and a final decision did not issue until August 30, 1962 (Skelly Pet. 7). Absent refunds, the producer petitioners here will, in effect, have received a permanent certificate to sell gas in interstate commerce for a period up to two and a half years at an illegally high price—an "attractive gap" in regulation which must be eliminated. *Transcontinental Gas Pipe Line Co. v. FPC*, 365 U. S. 1 (1961).

(5) As justification for retention of substantial windfall amounts the Petitioners cite only three factors suggesting possible injury: inability to recoup (a) Federal income tax, (b) state production tax, (c) royalties paid upon the excesses collected (Skelly Pet. 25; Prado Pet. 9). But footnote 14 on page 4 of Prado's Petition indicates that state production taxes are the only actual expenditure made from these windfall excesses which producers might be unable to recoup when required to refund the excesses. At most these amount to only seven per cent of the windfalls in question here, TEXAS REV. CIV. STAT. tit. 122A, art. 3.01(1). An

order could be framed; without need for further burdening of the record, requiring refund of all excess moneys collected by producers which they were not as a matter of law required to disburse and could not legally recoup by means of adjustments over the life of these long-term sales contracts.

Distributor Respondents contend that based on the above facts and other facts of record the remand to the Commission ordered below could only result in a "directed verdict" ordering refund of windfall excesses. For this reason they saw no need to burden this Court with an appeal from the failure of the Court of Appeals to anticipate by ordering such a "directed verdict." Moreover, since the entire refund issue was remanded to the Commission for further proceedings, it was not clear that review of the order below by this Court was appropriate at this time. However, if the producers are successful in urging the granting of their Petitions for a Writ of Certiorari to review the court below on the refund issue, then Distributor Respondents would support the judgment below * on the ground that as a matter of law the Commission has a duty under the Natural Gas Act to order refunds in the present circumstance. Since the law is clear as to this issue, the only function to be served by a "new trial" would be further delay—a result which clearly should be avoided. *FPC v. Hunt Oil Co.*, — U. S. —, 11 L. Ed. 2d 878 (1964).

CONCLUSION.

For the above reasons Distributor Respondents respectfully urge that the Petition of Prado Oil and Gas Company in No. 987 to review the decision of the Court of Appeals on the initial price issue (No. 17859 below) be

* Such a defense on appeal is familiar to appellate procedure. See, *e.g.*, *Kunz v. Titusville*, 373 Pa. 528 (1953).

denied. Distributor Respondents' position on the grant of the Petition of Prado Oil and Gas Company in No. 987 and the Petition of Skelly Oil Company, *et al.* in No. 1026 on the refund issue is as set forth in the paragraph above. (p. 6)

Respectfully submitted,

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